Smitty's Supermarkets, Inc. ***and*** **United Food and Commercial Workers Union Local 322.** Case 17–CA–15664

March 11, 1993*

DECISION AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On August 5, 1992, Administrative Law Judge Richard J. Boyce issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an opposing brief, cross-exceptions, and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to remand the case to the judge for further development of the record, findings of fact, and, if appropriate, new conclusions of law and recommendations.[2]

The judge recommended dismissal of the complaint based on the Charging Party Union's refusal to comply with certain portions of a subpoena duces tecum served on it by the Respondent. The General Counsel argues in his exceptions that the judge should have granted the Union's petition to revoke the disputed portions of the subpoena, in accordance with Section 11(1) of the Act, because the documents sought do not relate to ''any matter in question'' in the present proceeding. For the reasons discussed below, we find merit in the General Counsel's position.

The complaint here alleges that the Respondent violated Section 8(a)(1) by interfering with, restraining, and coercing employees while they were engaging in picketing and handbilling at the Respondent's Springfield stores.[3] The Respondent contends that the picketing was prohibited by Section 8(b)(7)(C) and therefore its actions were not unlawful.[4] In furtherance of its defense, the Respondent subpoenaed numerous categories of documents from the Union. In response to a union petition to revoke the subpoena in toto, the judge revoked portions of the subpoena. The Union produced the documents sought in the remaining portions of the subpoena, with the exception of the following tems:

> Minutes of all meetings of Local 322, wherein you have discussed organizing of [Respondent's] stores . . . including minutes of general membership meetings, executive board meetings or other minutes where organizing activities of [Respondent's] stores were discussed. [Par. 1.]
>
> Any reports that have been sent by Local 322 to any International official concerning the handbilling or picketing or other conduct or activities at the Smitty's in Springfield. [Par. 7.]
>
> Minutes of all meetings of any organizing committee or subcommittee of Local 322. [Par. 8.]

The Respondent sought these materials in order to demonstrate that the Union's picketing had a recognitional object and therefore fell within the prohibition of Section 8(b)(7)(C) because a timely representation petition had not been filed. The General Counsel, however, contended that the documents are irrelevant because the Union was engaged in informational picketing and handbilling protected by the second proviso of Section 8(b)(7)(C), and such activity, in accordance with the Board's decision in *Hotel & Restaurant Employees (Crown Cafeteria)*, 135 NLRB 1183 (1962), enfd. 327 F.2d 351 (9th Cir. 1964) (*Crown Cafeteria II*), retains its protected status regardless of the existence of a recognitional object.

The judge found that the materials sought by the Respondent could relate to the object of the Union's picketing. The judge also rejected the General Counsel's argument that the presence of a recognitional object was irrelevant under the second proviso, finding that this position assumes without supporting evidence that the Union's activity here conformed with the requirements of that proviso. The judge concluded that in

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* This decision was inadvertently issued without a volume and slip opinion number.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We agree with the judge's ruling revoking portions of the Respondent's subpoena duces tecum, and with the judge's limitation on the scope of the subpoena, as set forth in fn. 3 of the judge's decision.

[3] The record shows that the picket signs bore the message: ''America works best when we say . . . Union Yes. Please don't shop Smitty's. United Food and Commercial Workers, AFL–CIO.'' The handbills distributed by the employees stated in part: ''Notice to the Public. This store is being informationally picketed by members of the United Food and Commercial Workers Union, Local 322. We are doing this so that you as a 'customer' will know that this company does not provide AFL–CIO union negotiated wages, hours, and working conditions for their employees. . . . So, the Members of our Union Would Greatly Appreciate Your Support—and we ask—Please Don't Shop at Smitty's!''

[4] Sec. 8(b)(7)(C) states that it is an unfair labor practice for a union

> to picket or cause to be picketed . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time . . . *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services.

view of the Union's refusal to comply with a subpoena for documents central to the Respondent's defense, dismissal of the complaint is appropriate.

We agree with the General Counsel that documents pertaining to a recognitional object on the part of the Union are not relevant to the issues presented in this proceeding. In *Crown Cafeteria II* the Board held that picketing that would otherwise be prohibited by Section 8(b)(7)(C) is protected by the second proviso if it satisfies two specific statutory conditions: (1) it must be ''for the purpose of truthfully advising the public (including consumers) that the employer does not employ members of, or have a contract with, a labor organization,'' and (2) it must not have an effect ''to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services.'' In *Crown Cafeteria II*, the Board expressly rejected the view that the proviso protects picketing only where there is no independent evidence of a recognitional or organizational object or other activity related to those goals. To the contrary, the Board found that such goals may be present and are even implicit in the nature of the messages that may be conveyed to the public under the language of the proviso. In an earlier case involving the Respondent, where the Board found that the Respondent did not unlawfully deny nonemployee organizers access to its premises, the Board also considered whether picketing by the Union was protected by the second proviso.[5] The picket signs in that case urged the public not to shop at the Respondent's store and stated that the Respondent did not have a contract with the Union. The Board adopted the judge's findinq that the picketing was not prohiited by Section 8(b)(7)(C). Contrary to the Respondent's arguments, the judge found that the picketing was protected because the conditions of the second proviso were met, and noted that the Board in *Crown Cafeteria II* viewed informational picketing as presupposing a recognitional or organizational object.[6]

We thus find that the judge in the instant case erred in requiring the Union to produce the internal document sought by the Respondent and in dismissing the complaint based on the Union's noncompliance. Contrary to the judge's finding, the evidence of a recognitional object sought through the production of these documents is not relevant to the Respondent's defense that the picketing was unprotected. As the above discussion indicates, the Union's picketing may be protected despite such an object. In fact, in his brief the General Counsel concedes as a matter of law the existence of a recognitional object here. Therefore, the evidence sought does not pertain to an issue in dispute in the present case. Rather, the relevant inquiry must be whether the picketing and handbilling satisfied the two statutory conditions noted above for protection under the second proviso.[7]

Accordingly, we grant the Union's petition to revoke the disputed paragraphs of the subpoena, reverse the judge's dismissal of the complaint based on the failure to comply with the subpoena, and remand this proceeding to the judge for the purpose of reopening the record to receive evidence, make findings of fact, credibility resolutions, and, if appropriate, revised conclusions of law and recommendations concerning whether the picketing and handbilling by the Union were protected under the second proviso of Section 8(b)(7)(C), and such further proceedings as he deems appropriate in order to resolve the remaining issues raised by the complaint allegations.[8]

ORDER

It is ordered that the above-captioned proceeding be remanded to Administrative Law Judge Richard J. Boyce for the purpose of reopening the record to receive evidence, make findings of fact, credibility resolutions, and, if appropriate, revised conclusions of law and recommendations concerning whether the picketing and handbilling by the Union were protected under the second proviso of Section 8(b)(7)(C) and such further proceedings as he deems appropriate in order to resolve the remaining issues raised by the complaint allegations.

[5] *Smitty's Super Market*, 284 NLRB 1188 (1987). We do not pass on whether the Board's conclusions on other issues in the earlier case are consistent with the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992).

[6] Id. at 1198 fn. 31 and cases there cited. See also *D'Alessandro's, Inc.*, 292 NLRB 81, 83 (1988), in which the Board found that to the extent that ''an ultimate recognitional object'' could be inferred, despite the union's disclaimer of interest, the informational picketing conducted by the union was still protected by the second proviso.

[7] In this regard, we note that the evidence regarding events contemporaneous with and at the same location as the picketing should be considered.

[8] Because we find that this case involves material issues of fact, we deny the Respondent's Motion for Summary Judgment.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and recommendations, including a recommended order, if appropriate. Copies of the supplemental decision shall be served on all the parties after which the provisions of Section 102.46 of the Board's Rules and Regulations, shall be applicable.

Naomi Stuart, Esq., for the General Counsel.
Donald W. Jones and *Nancy E. Siuda, Esqs.*, of Springfield, Missouri, for the Respondent.
Benjamin Francka, Esq. and *Glen Conyers*, Business Agent, of Springfield, Missouri, for the Charging Party.

DECISION

I. PROCEDURAL HISTORY

RICHARD J. BOYCE, Administrative Law Judge. I opened and adjourned a hearing in this matter in Springfield, Missouri, on November 20, 1991.

The complaint, based on a charge filed by United Food and Commercial Workers Union Local 322 (the Union), issued on August 12, 1991.[1] It alleges that the Union, using statutory employees, has engaged in ''picketing and handbilling'' since August 1990 ''to advise the public that employees of'' Smitty's Supermarkets, Inc. (the Respondent) in its three Springfield stores ''are not represented by a labor organization''; and that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) on six occasions in February and June 1991 by interfering with, restraining, and coercing the employees while engaged in those activities.

Respondent alleges in its answer, among other things, that the picketing and handbilling ''is not protected because . . . such conduct is banned by Section 8(b)(7)(C) of the Act.''

In anticipation of the hearing, Respondent served a subpoena duces tecum on the Union demanding production of some 31 categories of written materials. The Union then filed a petition to revoke in toto. I ruled on that petition at the outset of the hearing, granting in part and denying in part. The Union complied with certain of the surviving elements of the subpoena, but refuses to comply with others.

Because of the Union's partial noncompliance, I directed the parties to show cause, not later than December 20, why I should or should not dismiss the complaint, and adjourned the hearing indefinitely.

On December 16, I granted a request by the General Counsel[2] for a stay of the Show-Cause Order to permit her to seek guidance from the General Counsel's Division of Advice. By document dated February 21, 1992, presumably acting on instructions from the Division of Advice, the General Counsel appealed to the Board my failure to revoke the subpoena in full; and, by document dated March 11, Respondent filed a cross-appeal regarding those portions I had revoked.

By document dated March 17, Respondent filed with me a Motion for Summary Judgment. I responded on March 20, deferring ruling pending word from the Board on the General Counsel's February 21 appeal.

On April 7, the Board issued an order denying both the General Counsel's appeal and Respondent's cross-appeal and remanding the matter to me ''for further appropriate action.'' The Board noted:

> [T]he General Counsel's special appeal and the Respondent's cross-appeal appear to raise complex issues which do not readily lend themselves to resolution in the interlocutory appeal procedures under Section 102.26 of the Board's Rules and Regulations. The Board also notes that the administrative law judge has placed the parties on notice of his intention to dismiss the complaint in its entirety if the Union refuses to comply with the Respondent's subpoena as directed by the judge. Presumably the judge will write a fully articulated decision at that time. In these circumstances, the Board finds that the issues raised by the General Counsel's appeal and the Respondent's cross-appeal are more appropriately considered on the basis of a formal decision by the judge under Section 102.35 of the Rules and Regulations which is subject to the filing of exceptions and further briefing as provided in Section 102.46.

By order dated April 17, I gave the parties until May 11 to respond to my Show-Cause Order. I received the General Counsel's response on April 27, but nothing from the Union or Respondent.

II. THE UNION'S NONCOMPLIANCE

The Union refuses to comply, as directed, with paragraphs 1, 7, and 8 of the subpoena. Those paragraphs call for certain materials generated since July 1, 1990, namely:

> Minutes of all meetings of Local 322, wherein you have discussed organizing of [Respondent's] stores . . . including minutes of general membership meetings, executive board meetings or other minutes where organizing activities of [Respondent's] stores were discussed. [Par. 1.]
>
> Any reports that have been sent by Local 322 to any International official concerning the handbilling or picketing or other conduct or activities at the Smitty's in Springfield. [Par. 7.]
>
> Minutes of all meetings of any organizing committee or subcommittee of Local 322. [Par. 8.][3]

The Union's reasons for withholding production, as reflected by its petition to revoke, are that these paragraphs

> seek documents regarding the internal affairs of the Charging Party and its interunion [sic] activities. These activities are protected under the Act and should not be made available to the Union's adversaries. The documents requested do not relate to any matter in this pro-

[1] The charge was filed on June 14, 1991.

[2] I refer to the General Counsel's representative before me as the General Counsel.

[3] With regard to these demands, the subpoena as originally constituted reached back well beyond July 1, 1990, and did not restrict itself to matters specifically involving Respondent. In denying the petition to revoke, I imposed those limitations, which Respondent then incorporated in the subpoena by amendment on the record.

ceeding and are not material or relevant to any issue in this proceeding.

Respondent's stated purpose in demanding these materials was to seek evidence that the picketing and handbilling activities to which its alleged misconduct was addressed had a recognitional object proscribed by Section 8(b)(7)(C) of the Act, and thus were unprotected.[4] The underlying legal premise is sound; activities that violate Section 8(b)(7)(C) are unprotected. *Rapid Armored Truck Corp*., 281 NLRB 371, 371 fn. 1, 381–382 (1986); *Teamsters Local 707 (Claremont Polychemical)*, 196 NLRB 613, 614–615 (1972).[5]

The General Counsel contends, on the other hand, that the Union's activities came within the so-called second proviso in Section 8(b)(7)(C), so were protected regardless of object and duration.[6] The legal predicate behind this contention likewise is valid. *Laborers Local 840 (Blinne Construction)*, 135 NLRB 1153, 1158–1159 (1962).

Section 11(1) of the Act provides that the Board ''shall revoke'' a subpoena, on application, ''if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings . . . .'' As its terms and the absence of prehearing discovery warrant, this language is generously construed. E.g., *Oklahoma Press Publishing Co. v. NLRB*, 327 U.S. 186, 208–209 (1945); *Endicott Johnson Corp. v. NLRB*, 317 U.S. 501, 509 (1943); *NLRB v. G.H.R. Energy Corp*., 707 F.2d 110, 113 (5th Cir. 1982); *NLRB v. Williams*, 396 F.2d 247, 249 (7th Cir. 1968).

Although one cannot know without examining them, the minutes and reports the Union refuses to produce very well could ''relate to'' the object of its picketing and handbilling. I therefore conclude, consistent with my ruling at the hearing, that Respondent's subpoena satisfies the governing standard for production with respect to those materials.

So doing, I reject the General Counsel's contention that the second proviso renders the Union's object irrelevant. This contention assumes, incontrovertibly and without supporting evidence, that the picketing and handbilling conformed with the proviso requirement.[7] I also reject the argument implicit in the Union's petition to revoke that the subject materials are insulated from production by legal privilege.

III. DISMISSAL AS A SANCTION FOR THE UNION'S NONCOMPLIANCE

The question remains whether dismissal is a proper sanction for the Union's noncompliance. That in turn raises two subissues: whether the Act endows the Board with the power to impose that sanction and, if so, whether the present circumstances warrant its imposition.

A. *The Board's Power*

I have found no decisions in which the Board has dismissed a complaint because of a charging party's subpoena noncompliance. It considered that sanction in *Selwyn Shoe Mfg. Corp*., 172 NLRB 674 (1968), but concluded, based on its evaluation of the evidence and without speaking to the threshold question of statutory power, that the charging party's nonproduction did not prejudice the respondent and so did not warrant dismissal.[8]

Although the Board apparently has never imposed the sanction of dismissal because of subpoena noncompliance, it has imposed other sanctions, including the drawing of adverse inferences, permitting the party seeking production to use secondary evidence, precluding the noncomplying party from cross-examining about or rebutting that evidence, etc. E.g., *Control Services*, 303 NLRB 481 (1991); *International Medication Systems*, 244 NLRB 861, 862 fn. 2 (1979); *Bannon Mills*, 146 NLRB 611, 613 fn. 4, 633–634 (1964).

The courts of appeals generally have sustained the Board's use of these sanctions, citing the Board's inherent ''interest'' in maintaining ''the integrity of the hearing process.'' *NLRB v. C. H. Sprague & Son*, 428 F.2d 938, 942 (1st Cir. 1970); *NLRB v. American Art Industries*, 415 F.2d 1223, 1230 (5th Cir. 1969). Indeed, in *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972), the court chided the Board at considerable

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[4] Sec. 8(b)(7)(C) provides in pertinent part that a labor organization commits an unfair labor practice by

> picket[ing] or caus[ing] to be picketed . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees . . . where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization . . . .

[5] This defense would be available although the illegality of the picketing and handbilling had not been found in previous litigation, or if the General Counsel, by prior administrative determination, had found it to be legal. *Chicago Tribune Co*., 304 NLRB 259 (1991).

[6] The second proviso appears above in fn. 4.

[7] After I ruled on the petition to revoke and before the Union definitively announced its refusal to comply, the General Counsel introduced evidence that the picket signs stated: ''America works best when we say . . . Union Yes. Please don't shop Smitty's. United Food and Commercial Workers Union, AFL–CIO.'' The General Counsel also introduced a handbill, which stated in part that Respondent ''does not provide AFL–CIO union negotiated wages, hours, and working conditions for their employees.'' Even had the record been developed in these respects before my ruling, I would have been unable to conclude—not knowing what other evidence might eventuate and without close legal analysis—that the requirements of the proviso had been so irrefutably satisfied as to remove the issue of object from the case. My hesitance in this regard is reinforced by the Board's observations in *Mine Workers District 17 (Hatfield Dock)*, 302 NLRB 441 (1991), that the task of interpreting Sec. 8(b)(7) ''is a formidable one,'' that Sec. 8(b)(7) is ''not notable for its clarity,'' and that ''courts and commentators frequently have characterized the language in this provision, and specifically that in Subsection 8(b)(7)(C), as 'murky,' 'confusing,' and inartfully drafted.''

[8] The Eighth Circuit reversed the Board's finding that the noncomplying charging party had been illegally discharged—but because it disagreed with the Board's evaluation of the evidence, not because of subpoena noncompliance. *NLRB v. Selwyn Shoe Mfg. Corp*., 428 F.2d 217, 223 (8th Cir. 1970). The court rejected the respondent's argument that the Board should have dismissed the case in entirety because of the noncompliance, concluding as had the Board that the respondent ''was not prejudiced.'' Id. at 226.

length for not drawing an adverse inference faced with nonproduction.

The Ninth Circuit is an exception. Denying enforcement in part of the Board's Order in *International Medication Systems*, supra, it took the view that the Board's only recourse in the circumstance of subpoena noncompliance is to initiate enforcement proceedings in Federal district court.[9] *NLRB v. International Medication Systems*, 640 F.2d 1110 (9th Cir. 1981). The court accordingly faulted the Board's refusal to permit a noncomplying respondent to rebut secondary evidence, and remanded the unenforced portion of the case ''for the taking of additional evidence and an opportunity to seek enforcement of the subpoenas in district court.'' 640 F.2d at 1115–1116.

In support of this treatment, the Ninth Circuit, at 1115, exhumed this passage from *I.C.C. v. Brimson*, 154 U.S. 447, 485 (1894):

> The inquiry whether a witness before the Commission is bound to answer a particular question . . . or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination.

The court also invoked Williams, *Authority of Federal Agencies to Impose Discovery Sanctions: The FTC—A Case in Point*, 65 Geo. L.J. 739 (1977), stating at 640 F.2d 1115 fn. 5:

> Williams suggests that the power to impose discovery sanctions (and to determine the propriety of a subpoena) is inherently judicial and emerges from the contempt power. . . . He concludes that Congress has not vested agencies with this power and could not do so without violating due process by denying the party a fair opportunity to object to the discovery order.[10]

The Board, on remand, accepted the Ninth Circuit's thinking as the law of the case. *International Medication Systems*, 274 NLRB 1197 (1985). It did not give it broader significance, however, and in a later case, *Control Services*, supra, tacitly rejected it.[11]

The District of Columbia Circuit has rejected the Ninth Circuit's teaching, as well. In *Atlantic Richfield Co. v. U.S. Department of Energy*, 769 F.2d 771 (D.C. Cir 1984), the court stated at 793, in answer to the company's reliance on *NLRB v. International Medication Systems*, that it could not accept ''the thesis'' that the Department of Energy

> cannot impose evidentiary sanctions—of course, short of fine or imprisonment—when necessary to preserve the integrity of an authorized adjudicative proceeding.

The court noted at 793 that, whereas the Supreme Court's Brimson decision, cited by the Ninth Circuit, dealt with an investigative subpoena, it

> is wholly silent as to the power [of] an agency acting in an authorized judicial or quasi-judicial capacity to impose sanctions *short of a fine or imprisonment* in order to compel compliance with discovery orders issued during the course of an adjudicatory proceeding.

The court added at 793 that *Brimson* ''was decided in 1894, long before the advent of the 'modern administrative state.''' The court further stated at 794:

> We think the broad congressional power to authorize agencies to adjudicate ''public rights'' necessarily carries with it power to authorize an agency to take such procedural actions as may be necessary to maintain the integrity of the agency's adjudicatory proceedings.

The court continued at 795:

> It seems to us incongruous to grant an agency authority to adjudicate—which involves vitally the power to find the material facts—and yet deny authority to assure the soundness of the fact-finding process. Without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and oft-times has every incentive to refuse to comply.

Based on the Board's longstanding use of assorted sanctions to deal with subpoena noncompliance, the general approval of their use by the courts of appeals, and the D.C. Circuit's persuasive repudiation of the Ninth Circuit's contrary view, I conclude that the practice is within the Board's statutory power.

Moreover, I am unable to distinguish *in legal principle* between the sanctions the Board regularly has applied and that of dismissal in appropriate circumstances. Nor, apparently, can the Board, given its rationale—that nonproduction did not prejudice the respondent—for withholding that sanction in *Selwyn Shoe Mfg. Corp*., supra. Dismissal inarguably is more akin to the accepted Board sanctions than to the contempt sanctions of fine or imprisonment, which are beyond the Board's power. I therefore further conclude that dismissal is among the family of sanctions properly at the Board's disposal to maintain the integrity of the hearing process.

B. *The Appropriateness of Dismissal in the Present Circumstances*

Were this a civil matter, dismissal plainly would be appropriate under Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure. But, although Section 10(b) of the Act mandates that unfair-labor-practice proceedings ''shall, so far as practicable, be conducted in accordance with the rules of evi-

[9] Sec. 11(2) of the Act provides that, ''in case of contumacy or refusal to obey'' a Board subpoena, the Federal District Courts ''upon application by the Board shall have jurisdiction to issue . . . an order requiring'' compliance, and that ''any failure to obey such order . . . may be punished by said court as a contempt thereof.''

[10] The same argument appears in Note, *The Argument for Agency Self-Enforcement of Discovery Orders*, 83 Col. L.R. 215 (1983), wherein the commentator observes at 228–229: ''Discovery sanctions are merely a modern derivation of the contempt power, the ability to force compliance with one's orders. Consequently, if agencies do not possess contempt power, they do not possess discovery sanction power . . . .''

[11] The administrative law judge in *Control Services*, supra, acknowledged but disregarded the Ninth Circuit's *International Medical Systems* decision, instead relying on *Bannon Mills*, supra, ''and its progeny.'' 303 NLRB at 491 fn. 4 and accompanying text. The Board observed that the judge properly relied on ''*Bannon Mills* . . . and its progeny'' in light of the respondent's refusal ''to honor valid subpoenas for documents.'' Id.

dence applicable in the district courts of the United States under the rules of civil procedure,'' Rule 37(b)(2)(C) ''is not directly in point.'' *NLRB v. Selwyn Shoe Mfg. Corp*., supra, 428 F.2d at 224.

The remedies under the Act are designed to serve the public interest in the peaceful resolution of labor disputes, rather than vindicate private rights. Dismissal because of a charging party's defiance of a subpoena must be reconcilable, then, with that larger interest. I conclude, in the present circumstances, that the public interest would be better served by dismissal than by either of the alternatives—imposing the adverse-inference rule or ignoring the Union's intransigence. I base this conclusion on this aggregate of factors:

1. To permit a charging party to invoke the processes of the Act and draw on the resources of the Board, and yet to impede the Board's ability to ensure justice to all parties by flouting a valid subpoena, would compromise the Board's credibility as a nonpartisan servant of the public interest.

2. The Union could avoid dismissal by the simple expedient of complying with the subpoena.

3. Dismissal would not sacrifice the specific interests of anyone—an alleged discriminatee, for instance—powerless to comply with the subpoena and thereby avoid that fate.[12]

4. The materials sought by Respondent go to the core of its defense, not to an issue of only collateral import.

5. Although the adverse-inference rule is a useful and sometimes necessary sanction, a result dictated or influenced by its application is less satisfactory than one based on the evidence for which it substitutes—which evidence the Union chose to withhold.

CONCLUSION OF LAW

Dismissal of the complaint is warranted because of the Union's partial noncompliance with Respondent's subpoena.

[Recommended Order[13] for dismissal omitted from publication.]

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[12] Cf. Sec. 10584.1 of the Board's Casehandling Manual, Part III, which states that ''the right to the reinstatement and backpay claim of a noncooperative discriminatee may be eliminated or compromised'' if a settlement agreement can be achieved that otherwise satisfies the policies of the Act.

[13] In light of his disposition, the administrative law judge saw no need to address Respondent's March 17 Motion for Summary Judgment or its earlier cross-appeal of my partial revocation of its subpoena.